No. 80-441

In the Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,

Petitioners,

vs.

WESLEY P. BERNARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Chicago Council of Lawyers, with the written consent of all parties, submits this brief as amicus curiae, in support of the Respondents.

INTEREST OF THE AMICUS CURIAE

The Chicago Council of Lawyers (the "Council"), a member of the American Bar Association, is an association of approximately 1300 lawyers, most of whom are admitted to practice before the United States District Court for the Northern District of Illinois (the "District Court"). Many members of the Council practice regularly as counsel in class litigation before the District Court. Council members have represented both classes and individuals in class actions involving alleged violations of the United States Constitution and various civil rights statutes as well as in class suits arising under other federal legislation.

Until recently, the speech activities of Council members and other attorneys involved in class litigation before the District Court were governed by Civil Rule 22 of the United States District Court for the Northern District of Illinois ("Rule 22").[1] Rule 22, entitled

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[1] Rule 22 provided as follows:

> In every potential and actual class action under Rule 23, F.R. Civ. P. all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a

(footnote continued on next page)

motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraphs(b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

(footnote continued on next page)

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

"For the Prevention of Potential Abuses of Class Actions," was patterned after the rule recommended in the Manual for Complex Litigation[2] and was substantially identical to the non-communication order entered by District Court Judge Joe J. Fisher in the case at bar.[3] It subjected to the prior approval of the District

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[2] Manual for Complex Litigation, reprinted in 1 J. Moore, Moore's Federal Practice Pt. II, §1.41 (2d ed. 1980) [hereinafter cited as Manual].

[3] Unlike Judge Fisher's order and the Manual's proposed rule, Rule 22 did not contain an exception for constitutionally protected speech. However, as argued at p. 32, n. 5, infra, that exception does not cure the constitutional infirmities of a rule or order generally restricting communications.

Court almost all communications between formal parties in an actual or potential class action, or their counsel, and actual or potential members of the class.

The Council's interest in the issues raised by restrictions upon communications of litigants and their attorneys has been long-standing. In Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), it successfully challenged the constitutional validity of several local rules which severely curtailed the rights of litigants and attorneys to comment on pending criminal and civil litigation. Following the Bauer decision, the Council urged the Executive Committee of the District Court to repeal Rule 22. In requesting abrogation of the rule, the Council took the position adopted in the

en banc opinion of the Court of Appeals for the Fifth Circuit in the case at bar. It argued that Rule 22, like the rules struck down in Bauer, was an unconstitutionally overbroad and vague prior restraint on the First Amendment rights of attorneys, litigants, and potential litigants. It contended also that the enactment of Rule 22 exceeded the rule-making authority of the district courts in that it conflicted with the objectives of Fed. R. Civ. P. 23.

The Council's most recent action concerning Rule 22 was the submission of an amicus curiae brief in American Civil Liberties Union, et al. v. McMillen, 79-1576 (7th Cir. 1979), in support of a petition for issuance of a writ of mandamus directing the District Court to re-

scind an order entered pursuant to Rule 22 and to repeal Rule 22 itself. The order prohibited the parties and their attorneys in Jane Does, et al. v. City of Chicago, et al., 79 C 789 (N.D. Ill. E. Div.), a class action challenging the constitutionality of strip searches conducted by members of the Chicago Police Department, from "soliciting" class members. The petition for a writ of mandamus was denied.

In January, 1981, the judges of the District Court repealed Rule 22, after repeated requests by the Council and in light of the Fifth Circuit's holding in this case that a non-communication order virtually identical to Rule 22 was an unconstitutional infringement upon the First Amendment rights of attorneys and litigants. The outcome of this petition,

therefore, has special significance in the Northern District of Illinois. This Court's decision on the validity of non-communication orders will likely determine the future here of a rule which profoundly affects the rights of Council members and their clients to communicate freely regarding class litigation in which they are involved. The Council, thus, has a direct and immediate interest in the resolution of this case.

SUMMARY OF ARGUMENT

Restrictions on communications between parties to an actual or potential class action, or their counsel, and individual members of the actual or potential class seriously impinge upon their well-established constitutional rights to free speech, association, and meaningful access to the courts. Under

either prior or subsequent restraint analysis, a court may not restrain such communications in the absence of a clear showing that they are in direct and serious conflict with an important public or private interest and that such restriction is necessary to protect that interest. While the fair administration of justice is admittedly a significant governmental interest, it may not be invoked as a talismanic justification for the wholesale rejection of First Amendment rights. The constitution requires, moreover, that any ban on communications be tailored narrowly and specifically to avoid unnecessarily inhibiting the exercise of First Amendment freedoms.

The non-communication order entered in the case at bar, like the model rule and order after which it is patterned, does not satisfy constitutional standards.

It is based solely on speculative and theoretical fears that the parties or their attorneys may engage in abuses of the class action device sometime in the future. The general proscription against all communications, direct and indirect, is both vague and overbroad. It encompasses speech that presents no threat to the fair administration of justice as well as communications that will actually further that goal. The order improperly deters activities falling within the protection of the First Amendment. The Court of Appeals for the Fifth Circuit correctly held that such wide-ranging restrictions on communication exceed constitutional limitations.

In addition, general orders prohibiting all communications concerning class actions are in direct conflict with the

policies embodied in Fed. R. Civ. P. 23 and therefore, exceed the authority of the district courts to enter orders and enact rules so long as they are consistent with the Federal Rules of Civil Procedure. Rule 23 was intended to provide a mechanism for resolving suits involving common factual and legal issues and common claims for relief in a manner that would be economical, efficient, and effective for both the parties involved and the judicial system.

A communications bar presents formidable obstacles to the achievement of these objectives. It deprives the parties, their counsel, and the court of essential information in deciding whether to proceed on a class basis. It interferes with the proper maintenance of a class action by preventing free development of litigation strategy, discovery, and trial preparation.

It inhibits the flow of information to class members on matters affecting their interests. A communications bar thus, hinders meaningful access to the courts for both class representatives and class members.

While the district courts are not without power to monitor communications in the class action context, they may do so only in a manner that comports with Rule 23. This requires a specific record showing that the communications in question constitute particular abuses of the class action device. Any restriction on communications must, futhermore, be drawn to provide the narrowest possible relief from such abuses. The order entered in the case at bar fails to satisfy these requirements.

The en banc decision of the Court of

Appeals for the Fifth Circuit invalidating the non-communication order should be affirmed.

ARGUMENT

I

GENERAL RESTRICTIONS ON COMMUNICATIONS CONCERNING CLASS LITIGATION UNCONSTITUTIONALLY IMPINGE UPON FIRST AMENDMENT FREEDOMS

A. COMMUNICATIONS BY PARTIES TO CLASS LITIGATION AND THEIR COUNSEL ARE PROTECTED BY THE FIRST AMENDMENT

The order entered in the case at bar, like the proposed order and rule found in the Manual, generally prohibits parties to a class action and their attorneys from communicating, directly or indirectly, with potential or actual members of the class without the prior approval of the district court. It then sets forth a non-exclusive list of prohibited communications: (1) solicitation of legal representation, (2) solicitation

of fees and expenses from class members, (3) solicitation of requests to opt out from the class action, and (4) communications tending to misrepresent the nature and status of the litigation.

The communicative activities proscribed by this order, as well as the order and rule recommended in the Manual, are protected by the First Amendment to the United States Constitution. As this Court has said,

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give [individuals] the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them..., statutory rights which would be vain and futile if [individuals] could not talk together freely as to the best course to follow....And the right... to advise concerning the need for legal assistance - and most importantly, what lawyers [an individual] could confidently rely on - is an insep-

> arable party of this constitutionally guaranteed right to assist and advise each other.

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5-6 (1964). "Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971).[4] It includes efforts to

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[4] Petitioners' suggestion at p. 29, n. 29 of their brief that restrictions on communications after initiation of a lawsuit do not impinge upon this right ignores that access to the courts must be meaningful. A ban on communications can effectively deprive formal parties and class members of meaningful access to the courts for the redress of grievances. See discussion infra, pp. 41-45.

finance the costs of litigation. "That right [of access to the courts] would be a hollow promise if courts could deny associations of workers or others the means of establishing their members to meet the costs of legal representation." 401 U.S. at 585-586.

The First Amendment's protection of such activity does not depend on the nature of the underlying rights sought to be vindicated. The present litigation involves the assertion of civil rights, and therefore, falls squarely within this Court's decision in NAACP v. Button, 391 U.S. 415 (1963). However,

> the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it, the right of assembly, are not solely religious or political ones. And the rights

> of free speech and a free press are not confined to any field of human interest."

United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 224 (1967) (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)). See also Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827, 834 (N.D. Ill.), aff'd, 614 F.2d 775 (7th Cir. 1979) (according First Amendment protection to activities of association organized to pursue legal remedies for claimed securities fraud against members and to advise others of their rights and recommend legal counsel). Thus, the First Amendment protects communications relating to "civil rights" as well as "commercial" class litigation.

The constitutional protection afforded the associational activities of parties involved in class litigation extends to lawyers retained by them to represent

their interests. In Brotherhood of Railroad Trainmen v. Virginia, this Court found constitutionally protected a union's activities which involved advising injured union members not to settle any claims for damages without first seeing a lawyer and recommending that they consult counsel selected by the union. The Court held that such activity could not be enjoined and noted, "of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." 377 U.S. at 8. See also In re Primus, 436 U.S. 412, 431-432 (1978). The extension of such protection to lawyers recognizes that an attorney speaks for his client regarding all matters for which he is retained.

Protection of lawyers' communications regarding class litigation derives from practical necessity as well. As the Court of Appeals for the Seventh Circuit stated in invalidating a local rule prohibiting comment by attorneys involved in civil litigation:

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities....The lawyer for the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.

Chicago Council of Lawyers v. Bauer, 522 F.2d at 258.

The solicitation activity prohibited in this case also is protected by the First Amendment. Any alleged acts of solicitation by the respondents' attorneys in this litigation involving charges of

racial discrimination in employment are plainly within the rule, enunciated by this Court in NAACP v. Button and In re Primus, that solicitation of legal representation for the purpose of vindicating political and civil rights is constitutionally protected. The fact that respondents have requested money damages and attorneys' fees does not deprive solicitation activity of constitutional protection. See In re Primus, 436 U.S. at 429-430.

In fact, the Council believes that the distinction between "public interest" lawsuits and "commercial" litigation, drawn by this Court in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), is not appropriate in the context of solicitation by counsel for formal parties in purported or actual class litigation. The class action situation is quite different

from the circumstances of Ohralik, where the solicitation activity in question was directed at initially obtaining a client to institute a lawsuit. In contrast, the attorney for the formal party already has an individual client, whose interests he is bound to pursue, and depending on the stage of the litigation, either purports, or has been judicially determined, to represent adequately the interests of the class. Solicitation of additional class representatives is usually for the purpose of insuring sufficient numbers to withstand the effects of attrition and possible dismissal of a suit. Such activity by an attorney already retained to represent a formal party whose interests are potentially or actually the same as those of solicited class members hardly presents the dangers of stirring up litigation, assertion of fraudulent claims, misrepresentation,

undue influence, and overreaching potentially posed by solicitation of a prospective client to institute a lawsuit. Ohralik, 436 U.S. at 461. See Great Western Cities, Inc. v. Binstein, 476 F. Supp. at 835.

There is no justification for conditioning the right to engage in solicitation on the nature of the rights asserted in a class action or the motivation of legal counsel. Even those who favor a communications bar do not distinguish between types of litigation in terms of the frequency of potential abuses of the class action device. Moreover, the line drawn between "commercial" and "civil rights" litigation is necessarily arbitrary to some extent, and a distinction based upon the motivation of legal counsel has become blurred by the increasing availability of court-ordered fee awards under 42 U.S.C. §1988. See Maine v.

Thiboutot, 48 U.S.L.W. 4859 (U.S. June 25, 1980) (No. 79-838), (42 U.S.C. §1983 encompasses violation of any federal statute and availability of attorneys' fees awards under 42 U.S.C. §1988 is not limited to civil rights actions).

The First Amendment freedoms of parties to class actions and their counsel are admittedly not absolute. However, any restrictions on such rights must satisfy strict constitutional standards. Whether analyzed as a prior or subsequent restraint on speech, the order entered in the case at bar fails to fulfill such requirements.

B. A BLANKET RESTRICTION ON ALL COMMUNICATIONS BETWEEN PARTIES, OR THEIR COUNSEL, AND CLASS MEMBERS VIOLATES ESTABLISHED CONSTITUTIONAL STANDARDS IN THE AREA OF FIRST AMENDMENT RIGHTS

1. The Non-Communication Order Is Not Justified By The Need To Protect A Compelling Countervailing Interest

The non-communication order entered in this case is a classic example of a prior restraint, "a predetermined judicial prohibition restraining specified expression...." Chicago Council of Lawyers v. Bauer, 522 F.2d at 248; see Nebraska Press Association v. Stuart, 427 U.S. 539, 556 (1976). As such, it bears a heavy presumption against its constitutional validity. Id. at 558; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The proponents of a prior restraint must demonstrate that the expression sought to be restrained "surely [will] result in direct, immediate and irreparable damage" to a compelling public or private interest, New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J. concurring), or that it presents a clear and present

danger to an asserted interest. Thomas v. Collins, 323 U.S. 516, 530 (1945).

While the fair and proper administration of justice may justify some restraints on speech, "it does not authorize any blanket exception to the First Amendment." Rodgers v. United States Steel Corporation, 508 F.2d 152, 162 (3d Cir.), cert. denied, 423 U.S. 832 (1975) (citing Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941)). Free speech rights "should not be impaired...unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." Craig v. Harney, 331 U.S. at 373.

Even if rules or orders restricting communications concerning class actions

may not be characterized as prior restraints, Chicago Council of Lawyers v. Bauer, 522 F.2d at 248-49, they are still subject to exacting judicial scrutiny. Before a court can so limit fundamental rights, there must be a showing that the restraint on speech protects "a subordinating interest that is compelling." Bates v. Little Rock, 361, U.S. 516, 524 (1959).

In the case at bar, the Fifth Circuit noted that the district court entered the non-communication order in the absence of proof of the petitioners' unsworn charges of abuses by the respondents' attorneys and without making findings of fact. 619 F.2d at 464. It concluded that the court based its order on the recommendations of the Manual that district courts enact rules or enter orders limiting communications in actual or potential

class actions in order to protect against potential abuses of the class action device. 619 F.2d at 466.

The fact that abuses of the class action device have occurred in scattered cases or the remote possibility that the attorneys or parties in this action might commit some unknown abuse in the future does not establish a threat to the fair administration of justice sufficient to justify the entry of a wide-ranging communications ban. Moreover, many of the so-called abuses mentioned in the Manual in support of a communications bar, e.g., seeking a declaratory judgment as to the liability of one defendant, seeking to withdraw class allegations in an effort to effectuate an individual settlement, and negotiating a settlement with a second set of attorneys after the

first set had declined the offer, would not be prevented by a non-communication order. It is questionable whether other potential abuses mentioned in the Manual, e.g., solicitation of additional plaintiffs in class actions already filed, are actually abuses at all. See Zarate v. Younglove, 86 F.R.D., 80, 98 (C.D. Ca. 1980).

Thus, it is unclear what interests the order is intended to protect, how the prohibited communications threaten any legitimate interest, or whether the order is a reasonable means of protecting a countervailing interest. Restriction of First Amendment rights cannot be bottomed on such uncertainty, especially in light of the Manual's recognition that "generally, the experience of the courts in class actions has been favorable.... [A]buses

are the exception in class action litigation rather than the rule." Id. at 36-37.

2. The Restriction On All Communications With Class Members Is Impermissibly Overbroad

The First Amendment requires that restrictions on speech and associational activities be drawn carefully to avoid needless inhibition of constitutional rights. "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential tc the protection of the particular government interest involved." Procunier v. Martinez, 416 U.S. 396, 413 (1974). A legitimate and substantial government interest may not be protected "by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved. The breadth of legislative abridgement must be viewed in light

of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

The order here, like its counterparts in the Manual, suffers from overbreadth. The prohibition against all communications, direct or indirect, undoubtedly restricts protected speech and associational activities that pose no conceivable threat to the fair administration of justice or any other legitimate interest. In fact, it encompasses communications that actually would facilitate the fair and effective functioning of the judicial system. Only a narrowly-tailored order limiting only those communications which constitute specific abuses of the class action

device can satisfy constitutional standards.[5] Limitations on freedom of speech and association must not go beyond what is necessary to protect an established countervailing interest. Talley v. California, 362 U.S. 60, 64-65 (1960).

3. The Non-Communication Order Is Unconstitutionally Vague

Restrictions on fundamental liberties must satisfy constitutional standards

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[5] The special treatment of constitutionally protected speech in the order, and in the most recent version of the rule proposed in the Manual, does not cure its overbreadth. An attorney or party who communicates with class members in the belief that such communications are constitutionally protected may, nonetheless, be called upon to establish the basis for his belief, thus risking a possible contempt citation. The chilling effect on the exercise of First Amendment rights is surely as great as an outright prohibition of all speech.

of specificity. Specificity is especially critical where, as here, rights of free speech and association are involved.

> [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (footnotes omitted). A restriction on speech "so vague and indefinite in form...as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment." Winters v. New York, 333 U.S. 507, 509 (1948).

The order entered here, like its model in the Manual, is replete with

vague terms offering no guidance to attorneys, parties, or judges as to what behavior is permitted and what is prohibited. For example, the "indirect" communication prohibited by the order is susceptible of no limiting definition. Under this language, respondents or their attorneys risk violating the order if they respond to a reporter's questions concerning the class action, because they thereby may be communicating "indirectly" with class members. The ban on all communications certainly would encompass requests for information from class members. A lawyer therefore, risks punishment if he seeks information relevant to his client's case from persons with knowledge of the facts because they may be potential class members. As a result he may not satisfy his obligation to his client to investigate the facts fully.

Even the specific, but non-inclusive, prohibitions of the order are subject to widely varying interpretations. The line between prohibited "solicitation" and the mere transmission of information is difficult to draw, and the two messages are often part and parcel of the same communication.[6] The order offers no guidelines

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[6] This Court recently reiterated its view that solicitation is often inextricably entwined with First Amendment activity:

> Solicitating financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without solicitation the flow of information would likely cease.

Schaumburg v. Citizens for a Better Environment, 444 U.S. at 632.

for distinction. The prohibition on communications that tend to misrepresent the action or reflect adversely on the court, the parties, or their counsel likewise provide no indication of what is prohibited and what is permitted. Such vagueness forces parties and their attorneys to refrain from speaking at all in order to protect themselves against possible remote effects on their comments. See Chicago Council of Lawyers v. Bauer, 522 F.2d at 259 (prohibition against public comment on matter that is "reasonably likely to interfere with a fair trial" is unconstitutionally vague).

The order entered in this case, as well as the proposed rule and order after which it is modelled, do not comport with constitutional standards where restriction of First Amendment

freedoms is involved. Specific remedies and sanctions for specific abuses, such as discipline of attorneys who exceed ethical limitations in communicating with class members, are available and satisfy constitutional requirements. Abuses of the class action device are a legitimate area of concern for the district courts. At the same time, no court can ignore speech and associational rights guaranteed by the First Amendment in attempting to deal with such abuses.

II

BROAD RESTRICTIONS, BY ORDER OR RULE, UPON COMMUNICATIONS BETWEEN PARTIES OR THEIR COUNSEL AND ACTUAL OR POTENTIAL CLASS MEMBERS EXCEED THE AUTHORITY OF THE DISTRICT COURTS

The authority of the district courts to prescribe rules and enter orders regarding class litigation is limited by Fed. R. Civ. P. 23(d) and 83 and by

28 U.S.C. §2071. Rule 23(d) states that the court may make "appropriate orders" in the conduct of class actions. Rule 83 permits the district courts to "make and amend rules governing [their] practice not inconsistent with" the Federal Rules of Civil Procedure, and in cases not provided for by rule, to "regulate their practice in any manner not inconsistent with these rules." Section 2071 allows them to prescribe rules which "shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Rules and orders affecting class litigation must, therefore, comport with the policies of Fed. R. Civ. P. 23, which governs the initiation and maintenance of class actions. Rodgers v. United States Steel Corporation; Zarate v. Younglove, 86 F.R.D. 80, 93-94

(C.D. Cal. 1980).

The objectives of Rule 23 include

> the efficient resolution of the claims and liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

7 C. Wright and A. Miller, Federal Practice and Procedure §1754, p. 343 (1972) [hereinafter cited as "Wright and Miller"]. See also Hohmann v. Packard Instrument Company, 399 F.2d 711, 714-715 (7th Cir. 1968); Dubose v. Harris, 434 F. Supp. 227, 230 (D. Conn. 1977); Rutherford v. United States, 429 F. Supp. 506, 508 (W.D. Okla. 1977) (citing Wright and Miller); Contract Buyers League v. F&F Investment, 48 F.R.D. 7, 12-13 (N.D. Ill. 1969). This

Court recently summarized the purpose of class actions brought pursuant to Fed. R. Civ. P. 23(b)(3):

> The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 339 (1980).

In Califano v. Yamasaki, 442 U.S. 682, 701 (1979), it commented upon the desirability of class litigation in certain cases:

> [W]e note that class relief for claims such as those presented by respondents in this case is peculiarly appropriate. The issues involved are common to the class as a whole. They turn on questions

> of law applicable in the same manner to each member of the class....[E]ach individual claim has little monetary value. It is unlikely that differences in the factual background on each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Rules and orders, such as those recommended in the Manual, the order entered in the case at bar, and former Rule 22 of the District Court for the Northern District of Illinois, which impose far-reaching restrictions on the ability of litigants and attorneys in actual or purported class actions to communicate with class members, conflict squarely with the policies embodied in Rule 23 and severely impede the proper conduct of class litigation. By limiting virtually all discussion concerning class

actions they deprive Rule 23 of much of its force. Such restrictions deny parties and their counsel access to crucial information relating to the number of potential claimants or defendants involved in a particular action, the size and similarity of their claims or defenses, and the appropriateness of a formal party as class representative. The proponents of a communications bar have themselves recognized that "[i]n many such cases class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process." Manual, p. 34.

The lack of such information makes it exceedingly difficult, if not impossible, for parties and their attorneys to make an informed decision as to the propriety

and feasibility of proceeding with litigation on a class basis. Restrictions on communication thus, hinder meaningful access to the courts by actual or potential members of a class, see Zarate v. Younglove, 86 F.R.D. at 97 (it is especially desirable to involve class members in Rule 23(b)(2) class actions because they do not have the right to opt out of the class), and discourage the resolution of disputes common to many in the class action form.

Restrictions on communication also interfere with the effective, fair and efficient functioning of the judicial system. The trial court's decision on the propriety of class certification depends largely on evidence provided by counsel for the formal parties. If counsel cannot freely obtain information concerning the size of a potential class, the nature of the claims involved, the interests of the

potential class members, and the adequacy of the class representation, such information will, most likely, never reach the court. The unavailability of information on the very factors which govern the outcome of the class certification issue may often lead the district court to an improper decision to certify a class or to deny class certification.

The hazards created by broad non-communication orders do not cease with class certification. Once a class is certified, restrictions on communication with class members present formidable obstacles to class representatives and their counsel in fulfilling their obligations to members of the class and in effectively conducting litigation. Such restrictions interfere with their duty to "fairly and adequately protect the interests

of the class" as required by Fed. R. Civ. P. 23(a)(4). A communications bar disrupts the development of litigation strategy, discovery, and trial preparation for plaintiffs and defendants alike, and inhibits the flow of information to class members on matters affecting their interests. Moreover, unless a sufficient number of class representatives can be obtained through free communication with class members, the inevitable effects of attrition, particularly in long, complex cases, may result in dismissal of a meritorious suit.

The fact that communications are subjected to the prior approval of the district court rather than absolutely prohibited does not mitigate the deleterious effects on the commencement and maintenance of class actions. A requirement that all

proposed communications be submitted to the court and opposing counsel may deter counsel for class representatives from making necessary contacts with class members in light of the duty to maintain the confidentiality of attorney-client communications. Furthermore, obtaining prior court approval of every proposed communication is not feasible when such communications may necessarily be on an ongoing basis. A rule or order that requires prior court approval of all communications with class members will, in a practical sense, stop such contacts almost as effectively as an absolute prohibition on communications.

In a frequently-cited, comprehensive, and thoughtful article entitled Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318 (1976), the authors have summarized

the serious problems that orders such as the one involved here pose for the effective maintenance of class actions:

> The present practice in some federal courts of prohibiting communications with the class by both the class attorney and the class opponent in the absence of prior court approval, although responsive to concerns of abuse, seems overbroad and potentially dysfunctional. Class attorneys and class opponents may limit their communications with a class in order to avoid the time consuming process of obtaining prior judicial clearance and limit the risk of antagonizing the judge. As a result, class attorneys may be handicapped in their efforts to obtain a picture of the different situations of class members, information-gathering and necessary business communications by class opponents may be impaired, class members may be denied legal advice, and the court itself may be deprived of information potentially relevant to its litigation decision.

Id. at 1600-01.

The district courts are not absolutely without power to monitor communications

in the class action context. However, in order to avoid conflict with the important policies of Rule 23, any restriction on communications concerning actual or potential class litigation must be based upon "a specific record showing by the moving party of the particular abuses by which it is threatened," and must be formulated to afford "the narrowest possible relief which would protect the respective parties." Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied sub nom., Blue Cross v. Marsh, 434 U.S. 985 (1977). This standard is not met where, as here, a non-communication order is based solely on theoretical abuses or the occurrence of activities which encourage participation in the litigation of common claims and provide potential class members with information concerning the nature of a suit commenced on their behalf. Id.

Rules which generally constrain communications between formal parties or their counsel and class members in every potential and actual class action are necessarily made in the absence of any specific showing of actual or imminent abuse of the class action device. Hence, they too must fall when viewed in the light of the important objectives served by Rule 23. Rodgers v. United States Steel Corporation, 508 F.2d at 163-164.

CONCLUSION

For the foregoing reasons, amicus curiae the Chicago Council of Lawyers respectfully urges that the decision

of the Court of Appeals below should be affirmed.

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Dated: March 2, 1981

CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing Brief of the Chicago Council of Lawyers as Amicus Curiae in Support of Respondents have been served this 2nd day of March, 1981, by United States Mail, postage prepaid, upon the following counsel of records:

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